BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:	)	
	)	
Leased Commercial Access	)	
	)	
Development of Competition and Diversity	)	MB Docket 07-42
Video Programming Distribution and Carriage	)	FCC 18-80
	)	
Modernization of Media Regulation Initiative	)	MB Docket 17-105

To: The Commission

Comments of Baskin L. Jones, Jones Law P.A. on Notice of Proposed Rulemaking

July 30, 2018

Baskin L. Jones, individually and on behalf of Jones Law P.A. leased access end user and programmer submits these comments in response to the Commission's Notice of Proposed Rulemaking.

The FCC has in its notice directly solicited comment on several areas. The commenter will respond to each from the backdrop of the Cable Communications Policy Act of 1984 as well as the Cable Television Consumer Protection and Competition Act of 1992. Each of these pieces of legislation have clear intent, namely that Congress intended that barriers for individual leased access programmers to enter the cable tv marketplace should be lowered or removed. It did so by ensuring that a percentage of the cable space would remain open, that this space would be inexpensive, and that this space would be sparsely regulated (from the perspective of the leased access programmer).

With this as a backdrop the commenter responds to each of the questions put forth by the FCC:

- Is there any policy justification for not vacating the entire order? Is there any policy justification for retaining any particular rules adopted therein?

- The *2008 Leased Access Order*[1] contains elements which are in line with the intent of Congress in the Cable Communications Policy Act of 1984 as well as the Cable Television Consumer Protection and Competition Act of 1992. Those sections which would increase leased access paperwork and approval process should be repealed as well as those sections noted by the Sixth Circuit at the time of the stay. Any increase in paperwork requirements and additional burden being put on leased access programmers would be against the stated intent of Congress and would serve to chill leased access programming.

- We next seek comment on any updates and improvements we should make to our existing leased access rules. The stated purpose of the leased access statute "is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems."
  - The current leased access framework has been hobbled by the fact that cable companies have been adding obstacles to the path of leased access programmers and potential leased access programmers by creating impermissible surcharges which are not provided for by statute, and which have not been addressed by the FCC. Cable companies charged leased access programmers for services such as internet that are regularly provided for free to non-leased access broadcasters.
  - Additionally, cable companies are requiring applications, assurances, or layers of liability insurance. Each new expense to the leased access broadcaster is an additional nail in the coffin of what Congress intended.
- We note that the video distribution marketplace has become much more competitive since Congress first established the leased access regime in 1984. For example, at that time, direct broadcast satellite (DBS) service was not available to consumers as an alternative to cable. While consumers previously had access to only one pay television service, today they have access to multiple pay television services as well as online video programming. In addition, the number of channels offered by cable operators has increased. We invite comment on the current state of the leased access marketplace generally and on whether, and if so how, the prevalence of alternative means of video distribution should influence our actions in this proceeding.
  - Available supply of high definition (or low definition) cable channels has in recent years increased dramatically. Digital cable minimizes the expense of adding additional channels and has driven down costs to cable providers. Cable providers since the advent of high definition television have not provided competitive or comparable services to leased access patrons, and have left the channels in low definition, with prohibitively expensive airtime. The current cable, internet and fiber optic technology has caused the actual cost of opening additional channels and airtime on a cable channel to a negligible level. With this heightened supply of low cost channels economics tells us that the cost for the leased access broadcaster should continue to go down. Instead it seems apparent that these costs are artificially inflated by cable providers.
  - Congress intended that cable tv would have proportionate space for leased access programmers, even with the advent of DBS and internet alternatives this has not

[1] *Leased Commercial Access*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2909 (2008) (*2008 Leased Access Order*), *appeal pending, United Church of Christ v. FCC*, No. 08-3245 (6th Cir.).

changed Congress' intent. The terms and prices at which these leased access programmers operate in the cable tv space must be such that it is a viable option. As it stands the cable companies have made the barriers to entry into the marketplace much too high to compete.

- How many leased access programmers are currently in existence, and is that number increasing or decreasing?
    - Despite an incredible surge in interest in the creation of content among the general population the number of leased access programmers is decreasing due to the before mentioned barriers to entry into the marketplace.
- What portion of a cable system's programming consists of leased access? Do the leased access rules currently in effect facilitate the successful leasing of time by leased access programmers, and if not, what issues do programmers experience?
    - Based on information and belief leased access programming makes up a very small percentage of overall cable programming. This is because leased access programmers face prohibitive pricing, lack of high definition choices, surcharges for services provided on cable.
- To what extent do leased access programmers continue to rely on cable carriage versus alternative means of distribution? Does the widespread availability of DBS service today or the proliferation of online video distributors provide programmers, including leased access programmers, with more options for content distribution?
    - Content creators may be able to have their content seen by an audience, using DBS or online video but this audience represents a limited subset of the audience of cable tv subscribers specifically legislated to in the Cable Communications Policy Act of 1984 as well as the Cable Television Consumer Protection and Competition Act of 1992.
- Does the bona fide request limitation that currently applies to operators of small cable systems in any way discourage prospective leased access programmers, including small programmers, from seeking to lease access and if so, how? If we extend the bona fide request limitation to all leased access requests, should we adopt any modifications to the current definition of a bona fide request?
    - There has been no showing that cable companies are overwhelmed by the amount of requests for leased access programming. Requiring deposits, additional layers of liability insurance, and commitment to contract term, time slots, commencement date prior to being quoted prices and told which time slots are available makes the process much more difficult to individuals seeking a platform for their content. The bona fide requirement should be removed.
- Timeframe for Responding to Requests. Second, we invite comment on whether we should extend the time within which cable operators must provide prospective leased access programmers
    - Cable providers have gotten this information easily in our experience. Sometimes very short turnaround times due to more sophisticated technology and scheduling software. These shorter turn around times have likely involved fewer employees and, less time providing this information. There is no need to lengthen this time.
- Is a 45-day response period reasonable for leased access requests covering multiple systems, and if not, what response time period is appropriate?
    - 15 days.

- Is it necessary to also provide additional response time for single cable systems?
    - No.
- Would lengthening the deadline serve as a deterrent to or create a hardship for potential leased access programmers?
    - Lengthening the deadline would create an additional, unnecessary delay to a leased access programmer getting their content on the air. Given the time sensitive nature of most content this delay would have a chilling effect on the number of programmers.
- Should we maintain a longer deadline for operators of small cable systems as compared to other cable operators?
    - No.
- We seek comment on whether we should permit cable operators to require leased access programmers to pay a nominal application fee and/or a deposit, which is currently prohibited.
    - Any additional deposit, application fee, or layer of insurance requirement will serve to lessen the number of leased broadcast programmers.
- Cable operators state that requiring a deposit or a nominal application fee would "help defray the costs of gathering the information necessary to calculate the leased access rate and to respond to any bona fide requests for leased access capacity that never lead to an actual leased access agreement."
    - Cable operators would be happy to be paid additional amounts for work that they will be required to do. I think this argument will fall apart when the actual numbers of these requests are disclosed by the cable companies (and they absolutely should be prior to any change in the regulations) as well as the process to gather this information (which could be a few mouse clicks).
- Although the Commission previously found that such fees and deposits are not permissible, has anything changed that may persuade us that they are now a reasonable means of covering the costs of responding to leased access inquiries? If the Commission permits fees, what criteria should be used to determine whether an application fee is nominal? Rather than adopting rules governing what constitutes a "nominal" application fee, should the Commission evaluate such fees on a case-by-case basis when presented with a complaint that a particular fee is not nominal?
    - No fee should apply.
    - In the alternative, the fee should be truly nominal by definition:
        - Nominal adjective 1. being such in name only; so-called; putative: a nominal treaty; the nominal head of the country. 2. (of a price, consideration, etc.) named as a mere matter of form, being trifling in comparison with the actual value; minimal. No more than the cost of a cup of coffee.
- Similarly, if we permit deposits, should we establish rules regarding an appropriate deposit amount, or alternatively, evaluate deposits on a case-by-case basis?
    - There is no reason a deposit should exceed the cost of a day of airtime and a deposit would only ever be necessary in those situations where broadcasts are made billed after the airtime.
- If the Commission decides to adopt rules, how should it decide whether a deposit is reasonable?

    - Programming is instantaneous and there should be no deposit at all where leased access entities are prepaying for airtime. A deposit should never exceed the cost of one day's airtime.
- Should the cable operator refund all or part of the deposit if the leased access request does not result in carriage?
    - All
- We seek comment on whether it would be preferable to permit a nominal application fee or a deposit, or both, and on the costs and benefits of each option.
    - Additional barriers to entry and tying up the limited available capital of small businesses, entrepreneurs who are leased access programmers. This limits access to the very people who are intended to be helped by the Cable Communications Policy Act of 1984 as well as the Cable Television Consumer Protection and Competition Act of 1992.
- If we adopt our proposal to require all cable operators to respond only to bona fide leased access requests, is there any justification for requiring a deposit or application fee?
    - No.
- Would requiring a deposit or application fee prior to obtaining the information set forth in Section 76.970(i)(1) dissuade potential leased access programmers, particularly small entities, from seeking to lease access?
    - Yes, the process itself of applying and paying in this manner will be enough for some programmers who would have benefitted from leased access to either become frustrated or unable to invest additional capital into the process.
- Finally, should the Commission permit all cable operators, or permit only small cable operators, to require a nominal application fee or deposit before the operator responds to a leased access request by providing the information set forth in Section 76.970(i)(1)?
    - None.
- Fourth, we invite comment on modifications to our procedures for addressing leased access disputes. First, we propose to revise our terminology by referencing an answer to a petition, rather than a response to a petition.
    - This would be a welcome change.
- Second, we propose that the 30-day timeframe for filing an answer to a leased access petition should be calculated from the date of service of the petition, rather than the date on which the petition was filed.
    - Only if service is permitted through electronic means.
- Third, whereas Section 76.975 currently does not include any allowance for replies, we propose adding a provision stating that replies to answers must be filed within 15 days after submission of the answer.
    - Yes.
- For example, are any new rules needed to govern the relationship between leased access programmers and cable operators, such as a rule requiring cable operators to provide programmers with contact information for the person responsible for leased access matters?
    - This would be a welcome change.
- Should we adopt any new rules governing leased access rates?
    - As has been stated numerous times in this comment the rates are currently prohibitively expensive to interested content creators. Lowering rates and doing

away with other barriers of entry to the marketplace (internet charges for to connect to headend servers, requirements of additional layers of liability insurance) will mean leased access is available to programmers as was intended by Congress.

Respectfully submitted,

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